as to how incumbents can make that argument -- it defies both any reasonable construction of the order and the fact that all of the reasons the Commission gave for presumptive validity of rate of return prescriptions apply equally to asset life and depreciation prescriptions.[18] AT&T therefore requests that the Commission make absolutely clear in its reconsideration order that presumptive validity applies to all aspects of depreciation rates, just as it does to all aspects of cost of capital, and that incumbent LECs bear the burden of proving that real and imminent risks that somehow were overlooked by the Commission or state regulators when these rates were initially set now justify higher capital costs or shorter asset lives.

Second, the Commission should clarify that incumbent LECs cannot inflate unit costs by attributing to current ratepayers the costs of excess capacity constructed to serve future demand, but must calculate TELRIC-based unit prices either by (a) dividing the cost of a network sized efficiently to serve current demand by that current demand, or (b) dividing the cost of a network sized efficiently to serve some higher level of expected future demand by that expected future demand.

Exploiting perceived ambiguities in the Commission's statement that a TELRIC study should reflect "reasonably foreseeable capacity requirements," First Report and Order at ¶ 685, incumbent LECs in state proceedings have crafted a crabbed approach to "fill factor" assumptions that, unless prohibited, could sever rates from any economic cost foundation. They first model a reconstructed network that will support some assumed future level of demand that greatly exceeds current demand requirements

[18] The Commission's extensive analyses and equipment life findings in Docket No. 92-296, for example, are forward-looking and provide a good starting point for TELRIC calculations.

(through the use of low fill factors in the network design). They then determine the unit costs associated with the elements of that intentionally oversized network using as a divisor current demand, thereby inflating unit rates well above true economic costs.

In some cases it may be more efficient to build excess capacity now (to avoid the costs of future retrenching, for example, when new demand for that capacity materializes). Whether or not that is true in any given case will turn on whether the carrying costs associated with the excess capacity are lower (on a present value basis) than the cost savings associated with a single installation. But, in all events, the extra costs associated with this not yet used capacity are the responsibility of the future demand that it services, not current demand. Thus, efficient per unit economic costs associated with a network sized to meet future demand cannot be determined merely by dividing the total costs of those oversized facilities by current demand -- without regard to the future demand for which excess capacity was installed and which should therefore pay for that capacity. Similarly, it is perfectly consistent with TELRIC theory (and, indeed, conservative) to estimate forward-looking unit costs solely on the basis of current demand. All agree that there are economies of scale in the provision of network elements, and thus, the unit costs associated with a bigger network (i.e., one sized to serve higher future demand levels) should therefore not exceed (and most likely are lower than) the unit costs associated with a network sized to serve only current demand.

The Commission should clarify, however, that incumbent LECs cannot have it both ways. Numerator costs must be consistent with denominator demand. In this regard, the Commission should make clear that any attempt to support low fill

factors on the ground that an efficient provider would build substantial excess capacity to serve expected future demand growth, but then to estimate unit costs in a manner that assigns all of the costs of that excess capacity to current ratepayers would be inappropriate and inconsistent with the Commission's rule that unit costs should reflect "a reasonable projection of the sum of the total number of units . . . that the incumbent LEC is likely to provide . . . during a reasonable measuring period," 47 C.F.R. § 51.511(a).

Thus, the Commission should make clear that parties and states have two options. The first option, a relatively simple one, is to size a reconstructed network to meet only current demand (through the use of relatively high fill factors) and then to divide by current demand to determine unit prices. The second option, a more complicated one, is to use a lower fill factor initially (with higher fill factors as the new demand for which excess capacity was installed materializes) and then to attempt to determine unit prices that take both the initial demand, the eventual higher demand, and the speed in which this higher demand materializes into account.

C. The Commission Should Clarify that Any Cost Study that a Party Seeks to Use as a Basis for Any Rate Must Be Made Available to All Other Parties Without Restriction on Those Parties' Use of the Cost Study in the Arbitration in Which the Study Is Submitted or in Any Other Section 251 Arbitration Proceeding involving Any of the Same Parties.

Noting incumbent LECs' "asymmetric access to cost data," First Report and Order at ¶ 680, the Commission held that "an incumbent LEC may not deny a requesting carrier's reasonable request for cost data," id. at ¶ 155; that "[t]he record of any state proceeding in which a state commission considers a cost study for purposes of

establishing rates under [§ 251] shall include any such cost study," 47 C.F.R. § 51.505(e)(2); and that "[a]n incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology" established by the Commission, 47 C.F.R. § 51.505(e). The Commission further prohibited rates "that would enable the incumbent LEC to recover the same common costs multiple times," First Report and Order at ¶ 698. Notwithstanding these clear mandates, incumbent LECs have refused to produce all or parts of their cost studies to opposing parties and/or have attempted to narrowly restrict those parties' access to or use of them.[19]

Unless prohibited, this practice would impede competition in at least three ways. First, it would needlessly raise potential entrants' litigation costs. Second, it would allow incumbents with multi-state territories to tailor their cost studies in each state to maximize "costs" in that state without risk of cross-state challenges to the consistency of their approaches. Third, it would greatly increase the risk of double recovery by making it impossible for states or parties to determine whether the incumbent has used consistent allocators for common and other multi-state costs. See 47

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[19] In an effort to prevent review of its cost studies for consistency with the Commission's rules, Bell Atlantic, for example, has insisted on onerous protective orders and proprietary agreements that bar use of the cost studies even by the same parties in other arbitrations on the same issues and has refused to produce some portions of its costs studies for use even in the proceeding at issue.

C.F.R. § 51.505(c)(2)(B) ("The sum of the allocation of forward-looking common costs shall equal the total forward-looking common costs . . . attributable to operating the incumbent LEC's total network"). Accordingly, the Commission should clarify that cost studies may not be considered in arbitration proceedings unless they are fully available to all parties in a form that allows meaningful review and without restriction on those parties use of the studies in other arbitration proceedings.

D. The Commission Should Clarify Its Interim Default Proxy Ceiling Rules.

Certain of the interim default proxy ceilings -- in particular those based on currently tariffed interstate rates -- greatly exceed any conceivable measure of forward-looking economic costs and should be revisited. Even so, properly applied, the interim default proxy ceilings may in certain circumstances provide an avenue for the opening of local monopolies to competition. For this reason, and with the understanding that "every state should, to the maximum extent feasible, immediately apply the [Commission's TELRIC] pricing methodology," First Report and Order at ¶ 619, AT&T does not here seek reconsideration of any of the default proxy ceilings. In order to prevent incumbent LECs from evading those ceilings, however, AT&T does request that the Commission clarify its proxy rules in two respects.

First, the Commission should clarify that geographic deaveraging of loop rates must reflect all loops in the state, not merely the loops of particular incumbent LECs or the loops that an incumbent speculates requesting carriers will purchase.

The Commission's deaveraging rules are designed to reflect "cost differences in geographic regions" relating to population density. See First Report and

Order at ¶ 765. The proxies are intended to be an objective measure of the forward-looking costs of an efficient provider in a geographic area with particular density (and thus cost) characteristics, and deaveraging therefore should not have the effect of assigning different costs for different carriers in geographic areas with the same density characteristics. Thus, for example, in a state that is served by two carriers and that elects to deaverage into three population density bands or zones, the rates for the two carriers should be the same in each of those three zones. This will occur only if deaveraging is based upon and reflects all loops, such that when all loops of all carriers in a state are aggregated at the deaveraged rates, the weighted average of those rates will not exceed the overall average rate ceiling determined by the relevant cost study or default proxy. Of course, the end result of this process will be different statewide average rates for different carriers but that is a rational and appropriate reflection of the fact that the relative proportions of high and low cost areas served by those carriers differ.

TELRIC cost studies properly carry out geographic deaveraging by assigning each Census Block Group (or other geographic unit) to the appropriate density zone for costing purposes. However, incumbent LECs apparently see an opportunity to use geographic "deaveraging" to evade the Commission's default loop proxy ceilings and create a Lake Woebegone situation where the cost of all loops is above the average. The ILECs take this approach notwithstanding the Commission's statement that geographic deaveraging "weights [should be set] equal to the number of loops in each zone," First Report and Order at ¶ 797. Bell Atlantic, for example, has argued in the Pennsylvania

arbitration that default loop rates should be deaveraged on the basis of Bell Atlantic's "demand analyses." Because requesting carriers are more likely to purchase loops in urban areas than rural areas, Bell Atlantic contends that only the average rates of its lower cost urban loops need meet the Commission's proxy specifications.

Of course, the state loop studies upon which the Commission based its default loop proxies did not reflect any such speculation about the areas in which requesting carriers would focus their requests for unbundled loops, and, unless prohibited, this practice would allow incumbent LECs to impede competition by inflating its urban loop rates substantially above costs. It could also penalize smaller rural carriers by requiring them to decrease their rates to reflect the effect on the average of the inflated rates of larger urban carriers. Thus, the Commission should clarify that deaveraging -- for both interim and permanent rates -- should be based solely on density zone cost differences and not on the identities of incumbent LECs or their speculations about the areas in which requesting carriers may focus their requests for unbundled loops.

Second, the Commission should clarify that recurring charges associated with operational support systems generally should be built into the charges for the network element or elements that such systems support, that the interim default proxy rates established by the Commission already reflect such costs, and that no additional default proxy charge for operational support systems may be imposed.

As the name implies, operational support systems support requesting carriers' use and incumbent LECs' provision of other network elements (either single elements or combinations of elements). It should therefore be unsurprising that some of the same personnel and facilities used to provide the elements themselves are also used to

provide operations support for those elements. There is nothing to be gained by carrying out the complex exercise of separating out the costs of operations support systems, and doing so would merely create an allocation process of the type that the Commission intended to avoid through its use of TELRIC. See First Report and Order at ¶ 678. To avoid unnecessary complication and potential double recovery, the Commission should similarly clarify that it did not intend (and will not allow) an additional default charge for operational support systems, and that recurring costs associated with such systems should generally be built into the permanent rates of the network elements that such systems support.

II. THE EXCLUSION OF "SHORT TERM" PROMOTIONS FROM THE ILECS' OBLIGATION TO PROVIDE SERVICES AT "WHOLESALE" RATES IS CONTRARY TO THE LANGUAGE AND PURPOSE OF THE ACT, AND SHOULD BE RECONSIDERED.

Section 251(c)(4) of the Act requires ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." In the First Report and Order, the Commission properly construed this obligation to apply to all telecommunications services offered to end-users: "the 1996 Act on its face does not exclude [discounted] offerings from the wholesale obligation. If a service is sold to end users, it is a retail service." First Report and Order, ¶ 951.

The First Report and Order, however, creates an exception for "promotions," defined as "price discounts from standard offerings" (¶ 948), that do not exceed 90 days (¶ 950). The Commission observes that the Act "does not define 'retail

rate,'" and reasons that this "ambiguity" permits it to recognize an exception for such promotions. This exception, however, is foreclosed by the plain language of the statute, and the Commission's construction of that language in ¶ 951.

Contrary to the Commission's finding, there is no "ambiguity" in the statutory language. Section 251(c)(4) refers to telecommunication services offered "at retail" to subscribers who are not telecommunications carriers. The Commission properly concluded in paragraph 951 that this obligation applies to all telecommunications services "sold to end users," including discounted offerings. Paragraph 951 correctly recognizes that inclusion of the word "retail" in the statute was intended solely to distinguish services and terms provided to end-users from those provided to resellers, not to create or authorize the creation of different categories of such telecommunications services and terms.[20]

This conclusion is buttressed by Section 252(d)(3), which requires that the wholesale discount be determined on the "basis of retail rates charged to subscribers for the telecommunications service requested . . . ." In the case of promotional offerings, the rates "charged to subscribers" are the rates subscribers actually pay, including any

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[20] In effect, the First Report and Order arbitrarily adopts different definitions of the same term, "retail," depending on whether it is followed by the term "service" or "rate." The order fails to explain why the phrase "retail service" should be defined as any service "sold to end users," but why the phrase "retail rate" does not mean any rate offered to end users.

discount, whether promotional or otherwise.[21] The duration of the discount is simply irrelevant.

Congress had sound policy reasons for requiring that ILECs provide wholesale discounts on all rates offered to end users. The ability to provide competitive services on a resale basis will help new entrants gain a foothold in the local services market, especially during the critical period when alternatives to the ILECs' networks do not exist. Excluding any promotions from the ILECs' wholesale obligation would allow ILECs to target discounts to their most attractive retail subscribers, at precisely the time the ILEC is selling "wholesale" service at potentially higher prices to CLECs wishing to enter the resale business. Such an unearned competitive advantage, even of short duration, would obviously prevent resellers from effectively offering similar discounts to such customers, and could well be decisive in customer buying decisions. The Commission's attempt to carve out an exception to this requirement would thus violate not only the Act's plain language, but also the sound policy which underlies it.

III. THE COMMISSION SHOULD CLARIFY THAT CLECS MAY COLLOCATE REMOTE SWITCH MODULES AT ILEC PREMISES.

The First Report and Order declines to adopt a general requirement that ILECs permit collocation of "switching equipment," because "it does not appear that

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[21] See generally Anaheim v. FERC, 941 F.2d 1234, 1248 (D.C. Cir. 1991)(credit included in end-user bills is considered in determination of a utility's "retail" revenues).

[such equipment] is used for the actual interconnection [of networks] or access to unbundled elements." First Report and Order at ¶ 581. The First Report and Order recognizes, however, that "modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated." Id.

Remote switch modules and/or optical switching modules (collectively "RSMs") are the types of equipment which most clearly bridge the gap between switching and transmission equipment.[22] CLECs will use RSMs predominantly for the same purposes as transmission equipment, i.e., RSMs will multiplex and forward traffic to the CLEC's host switch, that will be housed at a separate CLEC location.[23] The only switching an RSM will perform in this application is for the minority of calls that are completed between two CLEC customers, both of whom are served by unbundled local loops that are provided through the same ILEC central office.[24] Moreover, when RSMs

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22 RSMs do not perform all of the functions of a central office (or host) switch. In particular, RSMs do not perform recording and SS7 signaling functions.

23 The First Report and Order incorrectly assumes that transmission equipment interconnects directly with ILEC elements but "switching equipment" does not. Both DLCs and RSMs interconnect with ILEC network elements at a CLEC cross-connect frame in collocated space, using frames that are physically and functionally identical. Thus, RSMs will "access" and "interconnect" with unbundled network elements in the same manner as transmission equipment in collocated space.

24 Some LECs have asserted that if RSMs are collocated they may not even be permitted to provide such incidental switching. This is inconsistent with the Commission's general policy favoring the economic use of capital investment. More fundamentally, an incumbent's efforts to prohibit such incidental switching would be an unjust and unreasonable condition on the CLEC's right to collocate equipment on the incumbent's premises.

are used to complete CLEC intra-office calls, they will replace transmission equipment that would otherwise be used to handle such calls. Thus, in cases where RSMs would be appropriate, use of such equipment would be at least as space efficient as the transmission equipment it replaces.[25]

The Commission therefore should clarify that CLECs may collocate RSMs in ILEC space when the RSMs are used primarily to perform the functions otherwise performed by transmission equipment such as digital loop carriers ("DLCs") and are only incidentally performing line-to-line switching. Clarification of this matter is important, because several incumbents, in purported reliance on the Order, have refused AT&T requests to collocate RSMs.[26]

CLECs need the opportunity to collocate RSMs in order to ensure parity of service with the incumbent. If a CLEC cannot install an RSM in its collocated space, it must connect its DLC with the incumbent's DLC for customers served by the incumbent's DLC system, which can cause repair and maintenance difficulties for CLECs. This "cascaded" DLC configuration makes it impossible for an incumbent to test its unbundled loops using existing remote testing systems, because dial tone loops

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[25] Generally, an RSM would take up no more space than the multiple digital loop carriers ("DLCs") it would replace. An RSM can handle many times the traffic of DLC units, allowing a CLEC to plan for significant growth without the need to incur the cost to install additional units in the collocated space.

[26] For example, in negotiations with AT&T, NYNEX had orally agreed to permit AT&T to install RSMs in collocated space. After the First Report and Order was released, NYNEX retracted that position.

are typically tested through their corresponding switch port.[27] Once the loop is unbundled from the incumbent's switch port, the incumbent must rely on the CLEC to provide loop test data and to dispatch an appropriate technician from the incumbent's central office to correct troubles on the line.

Current test processes, however, do not allow CLECs remotely to isolate the location of troubles on loops that are aggregated and provided through a DLC unit.[28] Rather, such testing must be done manually by an incumbent LEC craftsperson, which leads to slower testing and increased time to repair intervals. This process also creates the potential for additional problems, such as erroneous dispatches. In contrast, it is possible for a CLEC that uses an RSM to remotely access and test individual lines at the collocated space, speeding the identification and resolution of reported troubles on unbundled loops.[29]

Thus, failure to permit CLECs to collocate RSMs harms both new entrants and consumers, because it unnecessarily increases the CLEC's equipment and facilities costs and impairs the quality of some of the CLEC's services.

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27 In addition, tests conducted by AT&T Laboratories indicate that use of a DLC-RSM configuration in lieu of a cascaded DLC arrangement produces a 2dB signal-to-noise improvement.

28 In the cascaded DLC environment, the incumbent's test facilities between its central office and field DLC components cannot be accessed by the CLEC.

29 In order to perform such tests, the CLEC must be able to access the incumbent's Pair Gain Test Controller ("PGTC") that is collocated with the incumbent's switch. The RSM must be collocated at the incumbent's central office, because the link between the RSM and the PGTC must be 500 feet or less.

IV. THE COMMISSION SHOULD RECONSIDER AND DETERMINE THAT ILEC DARK FIBER IS INCLUDED WITHIN THE SCOPE OF EXISTING ILEC NETWORK ELEMENTS.

The First Report and Order (¶ 450) declines to address the request of potential new entrants that ILECs' "dark fiber" be made available as part of the ILECs' unbundled transmission facilities network element, stating that it lacks sufficient information on whether dark fiber "qualifies as a network element." First Report and Order at ¶ 450. The FCC should reconsider this decision, because dark fiber clearly falls within the statutory definition. It is important that the Commission grant reconsideration, because several RBOCs, including SWB, NYNEX and Bell Atlantic, have rejected or refused to respond to AT&T's requests during negotiations for access to their dark fiber.[30]

The First Report and Order identifies only one argument why dark fiber might not fall within the statutory definition of "network element," i.e., GTE's claim that Section 153(45) refers to facilities that are "used" in the provision of telecommunications service, and LECs do not "use" dark fiber in their networks. Id. at ¶ 432. GTE's argument, however, proves too much. There are many facilities and equipment in ILEC networks that the ILECs may not utilize at any particular time. This

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[30] AT&T emphasizes that it is not necessary for the Commission to establish a "new" or additional network element. Rather, AT&T merely seeks assurance that it will have the opportunity to use existing and in-place ILEC transmission facilities for the very purposes for which they were constructed -- either as an unbundled loop or as interoffice transport.

does not mean, however, that such facilities are not "used in the provision of a telecommunications service."

Dark fiber is nothing more than excess transmission facility capacity which the ILEC has installed in its network to enable it to provide exchange and exchange access services in the future. The Commission's failure to require ILECs to offer CLECs the opportunity to access and use such excess capacity is comparable to giving ILECs the right to deny competitors the opportunity to use spare "extra line" capacity in a loop serving a residential premise simply because the ILEC is not presently "using" that capacity to provide a telecommunications service. The Commission has not interpreted Section 251(c)(3) so narrowly,[31] and there is no reason to apply a different analysis to loops or interoffice transmission facilities.[32]

Dark fiber is identical to other ILEC fiber transmission facilities, except that it is not equipped with electronics. It is in fact spare strands of fiber which generally co-exist on the same fiber cable which is providing unbundled transport or loop

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31 See First Report and Order at ¶¶ 410, 412; see also id. at ¶ 258 (adopting the concept that unbundled network elements are "physical facilities of the network, together with the features, functions and capabilities associated with those facilities").

32 The Commission has also found that one of the purposes of allowing CLECs to use unbundled network elements is that they may make different uses of such elements than the ILEC (see First Report and Order at ¶ 333 (describing CLEC's ability to use ILEC capabilities to provide Centrex services, even if the ILEC does not use its facilities to provide such services)). CLECs' use of dark fiber is just another example of how competition can lead to a broader and more economic use of existing ILEC facilities.

facilities. The ILECs have purchased and installed dark fiber based upon their economies of scale and scope, which the First Report and Order (¶ 11) finds must be made available to new entrants.[33] Thus, there is no reason to treat "dark fiber" differently from other fiber transmission facilities, and the Commission should require ILECs to make dark fiber available to CLECs, as part of the existing transmission facility network elements, wherever it exists, unless the incumbent can show that fulfilling a CLEC's request would be technically infeasible.

Granting CLECs the opportunity to use ILEC dark fiber facilities fosters competition much more than requiring competitors to build their own duplicative facilities. ILECs have already obtained the rights of way for, and paid for, their dark fiber facilities, but they are generating no revenues from those facilities. Permitting CLECs to use such facilities should enhance competition and economic efficiency by making profitable procompetitive use of such facilities.

CONCLUSION

For all of the reasons set forth above, the Commission should reconsider and clarify the First Report and Order to ensure that it complies with the Act and to promote the procompetitive purposes of the Act. Specifically, the Commission should:

- clarify that "one-time" non-recurring costs that reflect any differences between an efficient single provider network and one designed, as the Act

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[33] "[T]he local competition provisions of the Act require that [ILECs'] economies be shared with entrants" (First Report and Order at ¶ 11).

requires, to serve multiple carriers must be treated like all other costs of the "reconstructed network" and recovered in an efficient, competitively neutral, and non discriminatory manner.

- clarify that incumbent LECs may charge only for the forward-looking costs of one-time activities and transactional non-recurring activities that an efficient provider would undertake to provide the requested facilities.

- establish a rebuttable presumption to be used in TELRIC cost studies (as well as a default proxy ceiling that states may use on an interim basis) that the forward-looking cost of any non-recurring activity that can be accomplished through software or other electronic means is $5, the same non-recurring charge the Commission established for electronic "PIC" changes.

- establish interim default proxy ceilings limiting charges for transactional non-recurring activities to currently tariffed retail service order charges, less the avoided cost discount used to determine wholesale rates, until cost studies consistent with the Commission's TELRIC guidelines are available.

- clarify that currently authorized asset lives and depreciation rates, like currently authorized rates of return, are presumptively forward-looking, and that incumbent LECs bear the burden of rebutting those presumptions in the event they believe that other values should be used in TELRIC cost studies.

- clarify that incumbent LECs cannot inflate unit costs by attributing to current ratepayers the costs of excess capacity constructed to serve future demand, but must calculate TELRIC-based unit prices either by (a) dividing the cost of a network sized efficiently to serve current demand by that current demand, or (b) dividing the cost of a network sized efficiently to serve some higher level of expected future demand by that expected future demand.

- clarify that any cost study that a party seeks to use as a basis for any rate must be made available to all other parties without restriction on those parties' use of the cost study in the arbitration in which the study is submitted or in any other Section 251 arbitration proceeding involving any of the same parties.

- clarify that geographic deaveraging of loop rates must reflect all loops in the state, not merely the loops of particular incumbent LECs or the loops that an incumbent speculates requesting carriers will purchase.

- clarify that recurring charges associated with operational support systems generally should be built into the charges for the network element or elements that such systems support, that the interim default proxy rates established by the Commission already reflect such costs, and that no additional default proxy charge for operational support systems may be imposed.

In addition, the Commission should reconsider its decision to exclude "short term" promotions from the ILECs' obligation to provide services at wholesale rates for resale. Such exclusion violates the plain language and purpose of the Act. The Commission also should clarify that CLECs may collocate remote switching modules at ILEC premises. Finally, the Commission should hold that ILEC dark fiber is an unbundled network element and included within the scope of ILEC obligations under Section 251(c)(3) of the Act.

Respectfully submitted,

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